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No. 99-1702

In the Supreme Court of the United States

TEXAS, PETITIONER

v.

RAYMOND LEVI COBB

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether the Sixth Amendment rule announced in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), which bars an officer from approaching a defendant to interrogate him on a charged offense when he has invoked the right to counsel, also applies to interrogation on a factually related but uncharged offense.

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INTEREST OF THE UNITED STATES

The question in this case is whether the police violated respondent's Sixth Amendment rights under *Michigan* v. *Jackson*, 475 U.S. 625 (1986), by eliciting incriminating statements about respondent's murder of two individuals after respondent had been charged with the burglary of the individuals' home and was represented by counsel on that charge. The Court's resolution of that question will affect the conduct of interrogations by federal law enforcement officers and the admissibility in federal prosecutions of voluntary statements taken in comparable circumstances.

STATEMENT

1. On December 27, 1993, respondent stabbed and killed Margaret Owings while burglarizing her home. Respondent carried Margaret Owings' body to a wooded area near the home. Respondent then went back to the Owings' residence

where he saw Margaret Owings' sixteen-month-old daughter, Kori Rae Owings, sleeping in her bed. Respondent carried the child, who was still sleeping, to the woods where he had left her mother's body. After retrieving a shovel from his residence, which was located across the street from the Owings' residence, respondent returned to the woods where he began digging a hole. The child subsequently awoke, started to approach her mother, and fell into the hole. Respondent buried Margaret Owings together with her daughter, who thereafter died of suffocation. Pet. App. A3, A4-A5, A9-A10. Respondent returned to the Owings' residence and removed a stereo, VCR, videotapes, and a bottle of tequila. Pet. 4-5.

Later that day, Margaret Owings' husband, Lindsey Owings, notified the Walker County, Texas, Sheriff's Office that his wife and daughter were missing and that some of his property had been stolen from his home. In February 1994, the sheriff's office received an anonymous tip that respondent might have been involved in the burglary. Walker County investigators questioned respondent about the burglary, but respondent denied any involvement. On July 15, 1993, respondent, while under arrest on unrelated charges, executed a written statement confessing to the burglary, but he denied any knowledge of or involvement in the disappearances of Margaret and Kori Rae Owings. A Walker County grand jury subsequently indicted respondent for the burglary. Pet. App. A4.

In August 1994, an attorney, Hal Ridley, was appointed to represent respondent on the burglary charge.[1] Shortly thereafter, Walker County investigators sought and obtained Ridley's permission to question respondent about

[1] The attorney apparently was appointed by letter from the court before respondent's arraignment on the burglary charge. Pet. App. B1-B3, B5.

the disappearances of Margaret and Kori Rae Owings. Investigators then questioned respondent, who denied any involvement in the disappearances. On September 13, 1995, investigators, after consulting with Ridley, again questioned respondent, who maintained that he was not involved in the disappearances. Pet. App. A4-A5.

Thereafter, respondent, who was free on bail with respect to the burglary charge, began residing with his father in Odessa, Texas. On November 11, 1995, respondent's father telephoned the Walker County Sheriff's Office and reported that respondent had confessed to him that respondent had murdered Margaret Owings in the course of burglarizing her home. Walker County investigators obtained an arrest warrant, which they sent by telecopier to Odessa police for execution. The Walker County investigators did not inform the Odessa police that respondent was represented by counsel in connection with the burglary charge. Pet. App. A5.

On November 12, 1995, Odessa police arrested respondent, who waived his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and gave police a written confession to the murders of both Margaret and Kori Rae Owings. Pet. App. A5. Respondent thereafter led investigators to the location where he had buried the victims' bodies. Pet. 6.

2. Respondent was charged with the capital offense of intentionally killing two persons in the same criminal transaction, in violation of Texas Penal Code Ann. § 19.03(a)(7)(A) (West 1994).[2] Before trial, respondent moved to suppress his murder confession on the ground that it was obtained by

[2] The indictment also charged respondent with the capital offense of murder in the course of committing a burglary, in violation of Texas Penal Code Ann. § 19.03(a)(2) (West 1994). Before trial, however, the State abandoned that charge and proceeded against respondent solely on the charge of capital murder under Section 19.03(a)(7)(A). Pet. App. D4. The record does not reflect whether respondent was ever tried in a separate proceeding for burglary.

the Odessa police in violation of his Sixth Amendment right to counsel. After a hearing, the trial court denied the motion to suppress. Pet. App. D1-D7. The court concluded that respondent had waived his *Miranda* rights, voluntarily confessed to the murders, and led police to the area where he had buried Margaret and Kori Rae Owings. *Id.* at D3, D4. The court also observed that, although in August 1994 an attorney had been appointed to represent respondent on the burglary charge, that attorney conceded at the suppression hearing that "he was *not* [respondent's] attorney on the Capital Murder" charge when respondent confessed to the murders. *Id.* at D6.

3. By a 6-3 vote, the Court of Criminal Appeals of Texas reversed respondent's conviction. Pet. App. A1-A27. The court observed that the right to counsel guaranteed by the Sixth Amendment "attaches at the initiation of adversarial proceedings." *Id.* at A6. Under this Court's decision in *Michigan* v. *Jackson*, 475 U.S. 625, 636 (1986), the court noted, "once the right to counsel has attached and has been invoked, any subsequent waiver [of the right to counsel] during police-initiated interrogation is ineffective unless counsel has first given his permission for the interrogation." Pet. App. A6. The court also found "relevant to this case * * * the Sixth Amendment rule that once the right to counsel attaches to the offenses charged, it also attaches to any other offense that is very closely related factually to the offense charged." *Ibid.*

Applying those principles, the court held that "[o]nce [respondent] was indicted for the Owings burglary, his Sixth Amendment right to counsel attached to that offense and to the capital murder offense, which was factually interwoven with the burglary." Pet. App. A7. The court further held that respondent asserted his right to counsel "by accepting Ridley's appointment as his counsel." *Ibid.* The court therefore concluded that, "before the Odessa police could

lawfully question [respondent] about the disappearances of the Owings, they were under an obligation to contact Ridley and get his permission." *Ibid.* Because police failed to take those steps, the court ruled that the fruits of the interview, including respondent's written confession, were inadmissible in the prosecution's case-in-chief. *Ibid.*

Three judges dissented. Pet. App. A8-A27. In their view, the officers reasonably viewed the conduct of respondent's attorney as indicating his unqualified and continuing consent to the questioning of respondent as long as respondent did not object. *Id.* at A11-A16. They also expressed the view that respondent's acceptance of counsel was not an unequivocal assertion of his right to counsel sufficient to invoke the rule of *Michigan* v. *Jackson*. *Id.* at A21-A25.

SUMMARY OF ARGUMENT

A. The Sixth Amendment right to counsel is triggered by the initiation of adversary judicial proceedings in a criminal case. The rule of *Michigan* v. *Jackson*, 475 U.S. 625 (1986), protects a defendant whose Sixth Amendment right has attached and been invoked. In order to safeguard the defendant's ability to deal with the State on a charged crime through counsel, the Court concluded that a defendant's waiver of his right to counsel in police-initiated interrogation is invalid. One requirement for the application of *Michigan* v. *Jackson* is that the accused have previously invoked his right to counsel. A question in this case is whether respondent's *acceptance* of counsel on his burglary charge constituted the *request* for the help of a lawyer envisioned in *Jackson*. But whatever the answer to that question, the conclusive fact here is that the statements respondent gave were introduced, not on the then-pending burglary charges, but on capital murder charges that had not been brought at the time of the interrogation. The Sixth Amendment right

to counsel therefore had not attached on the murder charges, and *Michigan* v. *Jackson* does not bar use of the statements.

B. In *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991), this Court made clear that the Sixth Amendment right to counsel is "offense specific"; thus, "its *Michigan* v. *Jackson* effect of invalidating subsequent waivers in police-initiated interviews is [also] offense specific." The proper test to apply to the "offense specific" Sixth Amendment right is the same-elements test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), that the Court applies in Fifth Amendment Double Jeopardy analysis. That test asks whether each offense contains an element that the other does not. If each does, they are not the same offense. The test yields predictable results and can be readily applied to determine which offenses are the subject of a pending prosecution (for which the right to counsel has attached) and which are not.

C. An extension of the rule of *Michigan* v. *Jackson* to uncharged, but closely factually related offenses, is not justified. There is no reason to hold that the offenses involved in a "criminal prosecution[]" under the Sixth Amendment embrace uncharged offenses that have different elements. The purpose of the Sixth Amendment is to ensure that the defendant, in responding to formal accusations that have been brought in court, has the assistance of counsel to guide him through the intricacies of the criminal legal process. But that purpose does not extend to uncharged crimes that may be under investigation, even if they are factually related to the charged crimes. As to those offenses, the Sixth Amendment right has not even attached. The suspect is thus as capable as any other suspect of making a knowing and voluntary decision whether to assert his Fifth Amendment rights to silence and counsel under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), or alternatively, to speak to law enforcement unaided.

D. This Court's decisions in *Brewer* v. *Williams*, 430 U.S. 387 (1977), and *Maine* v. *Moulton*, 474 U.S. 159 (1985), do not support the extension of *Michigan* v. *Jackson* to factually related crimes. In *Williams* and *Moulton*, the Court did reverse convictions because, after Sixth Amendment rights had been invoked on certain crimes, statements were improperly elicited on then-uncharged crimes. But whether the Sixth Amendment right had "attached" on those uncharged offenses when the statements were elicited was neither briefed nor argued, and it was not mentioned in either case. Those decisions thus do not control the question that now is squarely presented. And developments since that time—including the "offense specific" interpretation of the Sixth Amendment in *McNeil* and the adoption of an "elements" rather than a "same conduct" test under the Double Jeopardy Clause—undermine whatever precedential force *Williams* and *Moulton* might otherwise have had on the issue.

E. Finally, extension of *Michigan* v. *Jackson* to "factually related" but uncharged crimes would impose unjustified costs on society. Not only would such a test defy consistent and predictable application, but it would also result in the loss of some voluntary confessions obtained after compliance with the *Miranda* safeguards. A rule that suppresses such statements requires a substantial justification. Such a rule was found justified in *Michigan* v. *Jackson* to preserve the right to counsel once formal charges have been brought. But there is no similar justification when the State has neither formally charged a suspect with the offense about which he is asked nor attempted to use the suspect's incriminating statements in prosecuting the suspect on a charged offense. Extension of the prophylaxis of *Michigan* v. *Jackson* to uncharged offenses is thus unwarranted.

ARGUMENT

MICHIGAN v. *JACKSON* DOES NOT BAR THE ADMISSION OF RESPONDENT'S CONFESSION TO THE THEN-UNCHARGED OFFENSE OF CAPITAL MURDER

A. Respondent's Sixth Amendment Right To Counsel Had Attached On The Offense Of Burglary

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. As the text of the Sixth Amendment itself suggests, the right to counsel "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991) (internal quotation marks and citation omitted); accord *Moran* v. *Burbine*, 475 U.S. 412, 428 (1986); *United States* v. *Gouveia*, 467 U.S. 180, 188 (1984); *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977); *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion).

In *Michigan* v. *Jackson*, this Court established a prophylactic rule under the Sixth Amendment that, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 475 U.S. at 636; see *Michigan* v. *Harvey*, 494 U.S. 344, 345 (1990). The Court observed that it previously had held in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), that, under the Fifth Amendment's Self-Incrimination Clause, "an accused person in custody who has 'expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the

authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.'" 475 U.S. at 626 (quoting *Edwards*, 451 U.S. at 484-485). The Court in *Jackson* concluded that, because "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before[,] * * * the Sixth Amendment right to counsel at a postarraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation." *Id.* at 631, 632. If a defendant requests a lawyer with respect to a pending charge, the Court held, it would "presume that the defendant requests the lawyer's services at every critical stage of the prosecution," including police interrogation. *Id.* at 633.

The *Michigan* v. *Jackson* rule applies only when an accused invokes or asserts his Sixth Amendment right to counsel. In *Patterson* v. *Illinois*, 487 U.S. 285, 290 (1988), the Court declined to apply *Michigan* v. *Jackson* to suppress incriminating statements made by an accused who had been indicted and was in custody on murder charges, but who "at no time sought to exercise his right to have counsel present." The Court explained that its "decision in *Jackson* * * * turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with the police" and that "[p]reserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny—not barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Id.* at 291 (quoting *Jackson*, 475 U.S. at 631). The Court in *Patterson* noted, however, that it was "significan[t] that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities,"

explaining that "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." 487 U.S. at 290 n.3 (citing *Maine* v. *Moulton*, 474 U.S. 159, 176 (1985)).

In this case, when respondent was formally charged with the offense of burglary, his Sixth Amendment right to counsel attached with respect to that offense. See *McNeil*, 501 U.S. at 175. The first question presented by the petition (Pet. i) is whether respondent invoked the protections of *Michigan* v. *Jackson* by accepting the appointment of counsel. Regardless of the resolution of that issue, however, *Michigan* v. *Jackson* did not bar the admission of respondent's statements. A critical fact is that respondent was not charged with the murders at the time of his interrogation. The state court therefore erred, as a threshold matter, in holding that the attachment of respondent's Sixth Amendment right to counsel with respect to the burglary offense extended as well to the then-uncharged offense of capital murder.

B. Respondent Had No Right To Counsel On The Uncharged Offense Of Capital Murder When He Confessed To That Offense

1. In *McNeil* v. *Wisconsin*, 501 U.S. at 175, this Court held that the Sixth Amendment right to counsel is "offense specific." That right therefore "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings." *Ibid.* (internal quotation marks and citation omitted). The Court in *McNeil* also stated that "just as the [Sixth Amendment] right is offense specific, so also its *Michigan* v. *Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific." *Ibid.*

In *McNeil*, those principles led the Court to hold that officers did not violate the defendant's Sixth Amendment rights when they questioned him about uncharged offenses of murder, attempted murder, and armed burglary while he was in custody and under indictment for armed robbery. 501 U.S. at 175-176. The Court explained that, "[b]ecause petitioner provided the statements at issue here before his Sixth Amendment right to counsel with respect to the [uncharged] offenses had been (or even could have been) invoked, that right poses no bar to the admission of the statements in this case." *Id.* at 176 (emphasis omitted).

Earlier, in *Maine* v. *Moulton*, 474 U.S. at 180 n.16, the Court made clear that, where the government used an undercover agent to investigate the ongoing or future commission of crimes by an indicted defendant, "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment has not yet attached, are, of course, admissible at trial of those offenses." That holding necessarily entails the proposition that the Sixth Amendment protections on an indicted offense do not extend to all other crimes by the same defendant. See also *Moran* v. *Burbine*, 475 U.S. at 431 (interpreting *Moulton* to hold that "evidence concerning the crime for which the defendant had not been indicted * * * would be admissible at a trial limited to those charges"); *Kuhlmann* v. *Wilson*, 477 U.S. 436, 458 n.21 (1986) (same); cf. *Massiah* v. *United States*, 377 U.S. 201, 206-207 (1964) (proper for government to continue investigation of suspected criminal activities of a defendant, even though the defendant already had been indicted and had retained counsel for pending charges); accord *Hoffa* v. *United States*, 385 U.S. 293, 308 (1966). The rationale for the offense-specific rule under the Sixth Amendment is well-settled: "to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges

were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." *Maine* v. *Moulton*, 474 U.S. at 180.

2. Those principles dictate the conclusion that respondent's Sixth Amendment right to counsel had not attached with respect to the offense of capital murder when he confessed to that crime on November 12, 1995. At that time, although the State had charged respondent with burglary, the State had not charged him with capital murder or otherwise initiated formal adversary proceedings with respect to that offense. Thus, unless capital murder and burglary are the same "offense" for purposes of the Sixth Amendment, the Sixth Amendment and its protections under *Michigan* v. *Jackson* posed no bar to the admission of respondent's voluntary confession to the murders at his murder trial.

This Court has not defined what constitutes an "offense" for purposes of the Sixth Amendment. The Court's precedents firmly establish, however, that the question whether two factually related crimes constitute the same "offense" under the Fifth Amendment's Double Jeopardy Clause is determined by applying the "same elements" test set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). See *Rutledge* v. *United States*, 517 U.S. 292, 297 (1996); *United States* v. *Dixon*, 509 U.S. 688 (1993); cf. *Garrett* v. *United States*, 471 U.S. 773, 779, 790 (1985). If "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. "This test emphasizes the elements of the two crimes. 'If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" *Brown* v. *Ohio*, 432 U.S. 161, 166

(1977) (quoting *Iannelli* v. *United States*, 420 U.S. 770, 785 n. 17 (1975)).

While the Sixth Amendment refers to "criminal prosecutions," and the Double Jeopardy Clause to the "same offence," a single test should logically apply in both settings to determine whether an uncharged offense constitutes the same crime as the offense under indictment. The *Blockburger* test, moreover, is familiar to the courts and creates a bright-line rule that is easily administrable by judges, prosecutors, and law enforcement officers. Because it turns on the elements of the offenses charged in the indictment, it is of particular value to law enforcement officers who must decide at the outset of an investigation whether they may quesion an indicted suspect, after he has obtained counsel, about uncharged offenses.

Under *Blockburger*'s same elements test, the offenses of burglary and capital murder constitute separate offenses. To establish the crime of burglary under Texas Penal Code Ann. § 30.02(a)(1) (West 1994), the State must prove that a defendant entered a habitation, without the effective consent of the owner, with the intent to commit a felony or theft. By contrast, the offense of capital murder for the killing of two persons in a single criminal transaction under Texas Penal Code Ann. § 19.03(a)(7)(A) (West 1994) requires proof that the defendant committed murder by intentionally or knowingly causing the death of more than one individual during "a continuous and uninterrupted chain of conduct occurring over a very short period of time * * * in a rapid sequence of unbroken events." *Jackson* v. *State*, 17 S.W.3d 664, 669 (Tex. Crim. App. 2000) (quoting *Rios* v. *State*, 846 S.W.2d 310, 311-312 (Tex. Crim. App. 1992), cert. denied, 507 U.S. 1051 (1993)).[3] Because burglary and capital murder each

[3] The fact that burglary and capital murder contain dissimilar elements reflects the state legislature's view that the two crimes protect

"require[] proof of a fact which the other does not," *Blockburger*, 284 U.S. at 304, the two crimes are distinct offenses. Respondent's Sixth Amendment right to counsel with respect to the burglary charge therefore did not carry over to the capital murder charge, which had not been brought when respondent confessed to the murder.

C. The Sixth Amendment's Purposes Do Not Support Extension Of *Michigan* v. *Jackson* To An Uncharged Offense That Is Factually Related To A Charged Offense

1. In holding that "[o]nce [respondent] was indicted for the Owings burglary, his Sixth Amendment right to counsel attached * * * to the capital murder offense," Pet. App. A7, the state court relied (*id.* at A6-A7) on the decisions of lower courts that have concluded that there is an "exception" to the Sixth Amendment's offense-specific rule when police question a suspect about uncharged offenses that are "closely related" to or "inextricably intertwined" with the pending charges for which the defendant has invoked his Sixth Amendment right to counsel. See, *e.g.*, *United States* v. *Covarrubias*, 179 F.3d 1219 (9th Cir. 1999); *United States* v. *Arnold*, 106 F.3d 37, 40-41 (3d Cir. 1997); see also *United States* v. *Doherty*, 126 F.3d 769, 776 (6th Cir. 1997) (collecting federal and state cases), cert. denied, 524 U.S. 917 (1998). In applying that exception, courts have examined the conduct, time, place, motive, and victim with respect to an uncharged offense to determine whether it "arises from the same acts

distinct societal interests. Whereas the offense of capital murder is proscribed under Title 5 of the Texas Penal Code, entitled "Offenses Against The Person," burglary is proscribed under Title 7, entitled "Offenses Against Property." See generally 5 William Blackstone, *Blackstone's Commentaries* 177, 220 (Tucker ed. 1996) (explaining that homicide is a offense "injurious to the *persons* of private subjects" while burglary is an offense against the "*habitations* of individuals").

and factual predicates on which the pending charges were based." *Arnold*, 106 F.3d at 41; accord *Whittlesey* v. *Maryland*, 665 A.2d 223, 234 (Md. 1995), cert. denied, 516 U.S. 1148 (1996).

In this case, respondent's burglary and capital murder offenses did occur on the same day. But there was only a partial overlap in the place of the crimes and the victims. The burglary and the murder of one of the victims, Margaret Owings, occurred in the Owings' residence, while the murder of Kori Rae Owings occurred in the nearby woods. And the victims of the murders were Margaret and Kori Rae Owings, while the victims of the burglary were Margaret Owings and her husband, Lindsey Owings, who presumably owned the property taken from the residence. Pet. App. A3-A4, A9-A10. Importantly, respondent's conduct constituting each offense was distinct. Respondent committed burglary when he entered the Owings' residence with the intent to remove the stereo and other property from the residence. Texas Penal Code Ann. § 30.02(a)(1) (West 1994). Respondent committed capital murder when he stabbed Margaret Owings in her home, carried her body into the woods, returned to her home to retrieve her sixteen-month-old daughter, and buried the child alive along with her mother in the woods. Texas Penal Code Ann. § 19.03(a)(7)(A) (West 1994). Finally, respondent's motives for the two crimes were different. Respondent committed the burglary offense in order to obtain property from the Owings' residence. Respondent murdered Margaret and Kori Rae Owings because they witnessed the burglary. Br. in Opp. 14.[4] On balance, the distinctions

[4] Respondent contends (Br. in Opp. 14) that the two crimes are inextricably intertwined because the burglary "was the *precipitating event* which resulted in the murders, and was the *clear motive* for these killings, i.e., to escape detection for said burglary." But "committing a crime is separate from an attempt to avoid responsibility for it." *Whittlesey*, 665 A.2d at 236; see also *Hendricks* v. *Vasquez*, 974 F.2d 1099,

between the two offenses—different conduct, different motive, and a lack of symmetry in the victims and location—should lead to the conclusion that respondent's burglary offense was not, as the court below held (Pet. App. A7), "factually interwoven" with respondent's capital murder offense.

2. Our fundamental submission, however, is that a multifactored approach of this character should be rejected. The Sixth Amendment's text and purpose do not justify barring police from questioning a suspect about an uncharged offense simply because it is closely related factually to a charged offense.

Under the Sixth Amendment, an "accused" has the right to counsel to assist in his defense of a "criminal prosecution[]." Thus, once any suspect is charged with an offense, the Sixth Amendment right to counsel attaches with respect to *that* offense.[5] See p. 8, *supra*. Assuming that the accused thereafter invokes his right to counsel (see *Patterson*, *supra*), the Sixth Amendment as amplified by *Michigan* v. *Jackson* bars the police from initiating questioning concerning that offense. See *McNeil* v. *Wisconsin*, 501 U.S. at 180; *Maine* v. *Moulton*, 474 U.S. at 180. With respect to uncharged, albeit closely related, offenses, however, the State has not initiated formal adversary proceedings, and thus there is no "prosecution" to which the right to counsel can attach. See *United States* v. *Ash*, 413 U.S. 300, 32. 322

1104 (9th Cir. 1992) (concluding murder charges and a charge of interstate flight to avoid prosecution for the murder charges "were separate incidents" and were "neither 'inextricably intertwined' * * * nor did they arise from the same conduct).

[5] In felony cases, the Sixth Amendment entitles an indigent defendant to appointment of counsel in any felony case, while in a misdemeanor case, appointed counsel is required only if the charge results in a sentence of imprisonment. See *Nichols* v. *United States*, 511 U.S. 738, 743 & n.9 (1994).

(1973) (Stewart, J., concurring) ("The requirement that there be a 'prosecution,' means that this constitutional 'right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against [an accused.]") (quoting *Kirby* v. *Illinois*, 406 U.S. at 688 (plurality opinion)).

This Court has recognized that "[t]he purpose of the Sixth Amendment counsel guarantee * * * is to 'protect the unaided layman at critical confrontations' with his 'expert adversary,' the government, *after* 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime." *McNeil* v. *Wisconsin*, 501 U.S. at 177-178 (brackets omitted) (quoting *Gouveia*, 467 U.S. at 189); see also *Arizona* v. *Roberson*, 486 U.S. 675, 685 (1988) (Sixth Amendment right to counsel "arises from the fact that the suspect has been formally charged with a particular crime and thus is facing a state apparatus that has been geared up to prosecute him").[6] Indeed, in *Michigan* v. *Jackson*, the Court emphasized the "significance of the formal accusation, and the corresponding attachment of the Sixth Amendment right to counsel," and acknowledged that the Amendment's purpose is not triggered unless the State has accused an individual of committing a specific offense:

> Given the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adver-

[6] By contrast, the Court has explained that the protection of the Fifth Amendment's Self-Incrimination Clause is "broader" than the Sixth Amendment right to counsel to the extent that the Fifth Amendment "relates to interrogation regarding *any* suspected crime and attaches whether or not the 'adversarial relationship' produced by a pending prosecution has yet arisen." *McNeil* v. *Wisconsin*, 501 U.S. at 178; see also *Arizona* v. *Roberson*, 486 U.S. at 685.

> sary proceedings 'is far from a mere formalism.' *Kirby* v. *Illinois*, 406 U.S., at 689. It is only at that time 'that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'

475 U.S. at 631 (quoting *Gouveia*, 467 U.S. at 189).

Absent the considerations present when a State has brought charges against a suspect alleging a specific offense, the purposes of the Sixth Amendment do not support a rule that prevents the police from approaching a suspect who can then "mak[e] an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Patterson* v. *Illinois*, 487 U.S. at 291; see also *McNeil* v. *Wisconsin*, 501 U.S. at 178 ("One might be quite willing to speak to the police without counsel present concerning many matters, but not the matter under prosecution."); *Michigan* v. *Harvey*, 494 U.S. at 353 ("Although a defendant may sometimes later regret his decision to speak with police, the Sixth Amendment does not disable a criminal defendant from exercising his free will."); *Moran* v. *Burbine*, 475 U.S. at 430 ("The Sixth Amendment's intended function is not * * * to protect a suspect from the consequences of his own candor.").

Moreover, if the suspect is in custody, the Fifth Amendment as interpreted by *Miranda* requires police to advise the suspect of his right to counsel, which the suspect may invoke at any time to cause the police to cease their questioning. As this Court in *McNeil* v. *Wisconsin*, explained:

> If a suspect does not wish to communicate with the police except through an attorney, he can simply tell them that

> when they give him the *Miranda* warnings. There is not the remotest chance that he will feel "badgered" by their asking to talk to him without counsel present, since the subject will not be the charge on which he has already requested counsel's assistance (for in that event *Jackson* would preclude initiation of the interview) and he will not have rejected uncounseled interrogation on *any* subject before (for in that event, *Edwards* would preclude initiation of the interview).

501 U.S. at 180. Thus, in the absence of any indication by the defendant that he does not want to talk to police about an uncharged offense, even one that is factually related to a pending charge, *Michigan* v. *Jackson*'s prophylactic rule should not be extended to exclude a defendant's voluntary confession to the uncharged offense.

D. This Court's Decisions Do Not Support A Sixth Amendment Exception For Factually Related Offenses

Many lower courts have reasoned that an exception to the Sixth Amendment's offense-specific rule for factually related crimes is supported by this Court's decisions in *Brewer* v. *Williams*, *supra*, and *Maine* v. *Moulton*, *supra*, in which the Court reversed convictions on charges that had not been brought against the defendants in those cases at the time the incriminating statements at issue were made. See, *e.g.*, *Covarrubias*, 179 F.3d at 1223-1224; *United States* v. *Melgar*, 139 F.3d 1005, 1011-1014 (4th Cir. 1998); *Doherty*, 126 F.3d at 776; *Arnold*, 106 F.3d at 40-41; *United States* v. *Carpenter*, 963 F.2d 736, 740 (5th Cir.), cert. denied, 506 U.S. 927 (1992); *People* v. *Clankie*, 530 N.E.2d 448, 462-463 (Ill. 1988).[7]

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[7] In finding that the Sixth Amendment right to counsel attaches with respect to factually related uncharged offenses, the Sixth Circuit in *Doherty*, 126 F.3d at 776, also relied on this Court's decision in *Illinois* v. *Perkins*, 496 U.S. 292 (1990). In *Perkins*, the Court held that the Sixth

In *Brewer*, a defendant who had been formally charged with a child's abduction, and who had retained counsel with respect to that charge, was being transported by police from the city where he had surrendered to the city where the abduction had occurred. A detective traveling with the defendant elicited from the defendant the location of the child's body by expressing the view that the parents were entitled to a "Christian burial" for their child. 430 U.S. at 390-394. On habeas review of the defendant's conviction on murder charges, the Court held that the police violated the defendant's Sixth Amendment right to counsel when police questioned him outside the presence of his attorneys, reasoning that the police "purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible." *Id.* at 399. The Court further held that the defendant did not intentionally relinquish his right to counsel, explaining that his "consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right." *Id.* at 404.

In *Moulton*, the defendant was indicted on, and retained counsel with respect to, four counts of theft of vehicles and automotive parts. Thereafter, a co-defendant, Colson, began

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Amendment did not bar the State's use of an undercover agent to question the defendant about a murder while he was imprisoned on an unrelated battery conviction, reasoning that "[i]n the instant case no charges had been filed on the *subject* of the interrogation, and our Sixth Amendment precedents are not applicable." *Id.* at 299 (emphasis added). Focusing on the highlighted language, the court in *Doherty* concluded that "it is the subject matter of the interrogation, and not any formal distinction in the elements of the underlying charges, that is relevant for Sixth Amendment purposes." 126 F.3d at 776. The highlighted language is most naturally read, however, to mean that, had the defendant been formally charged with offenses relating to the murder, and had the defendant invoked his right to counsel for those charges, the State would have been barred from seeking incriminating statements about those charges without the presence of counsel.

cooperating with police and secretly tape-recorded conversations with the defendant in which the defendant made incriminating statements about the thefts as well as the defendant's plan to kill one of the witnesses on the theft charges. 474 U.S. at 162-166. In holding that "the State violated Moulton's Sixth Amendment right when it arranged to record conversations between Moulton and its undercover informant, Colson," the Court reasoned that "[t]he police thus knew that Moulton would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel." *Id.* at 176, 177. The Court rejected the contention that the police conduct was excused because the police were investigating the defendant's attempts to kill the witness to the theft charges. *Id.* at 178-180. The Court therefore affirmed the state court's decision, which had reversed the defendant's conviction for theft as well as a burglary offense that the State had charged after Colson began cooperating with the authorities. *Id.* at 167, 180.

Although the Court in *Brewer* and *Moulton* reversed convictions with respect to offenses that had not been charged at the time that the defendant made incriminating statments (the offense of murder in *Brewer* and of burglary in *Moulton*), neither decision actually addressed the issue of whether the Sixth Amendment attaches to uncharged, factually related offenses, and it does not appear that the State raised the point in either case. The Court in this case accordingly is "free to address the issue on the merits." *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993); see also *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, * * * and such assumptions * * * are not binding in future cases that directly raise the questions."); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (stating that prior decision is not controlling when

issue "was not there raised in briefs or argument nor discussed in the opinion of the Court"). Indeed, the Court in *Moulton* explicitly limited the reach of its decision to the State's obtaining of incriminating evidence that pertained to pending charges to which the Sixth Amendment had attached at the time that the police obtained the evidence. 474 U.S. at 180 n.16 ("Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses."); see also *Moran* v. *Burbine*, 475 U.S. at 431 ("The Court [in *Moulton*] made clear * * * that the evidence concerning the crime for which the defendant had not been indicted * * * would be admissible at a trial limited to those charges."). In suggesting that the State could have used the incriminating statements made by the defendant in a prosecution for the defendant's attempt to kill a witness to the charged theft offenses, 474 U.S. at 179-180 & n.16; see also *id.* at 185 (Burger, C.J., dissenting), the Court implicitly rejected the principle that the Sixth Amendment attaches to all offenses that have some factual relationship to the charged offense.[8]

In any event, both *Brewer* and *Moulton* predate *McNeil*, in which the Court expressly articulated the principle that

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[8] *Brewer* also involved the distinguishing feature that the police deliberately circumvented the defendant's Sixth Amendment right to counsel with respect to the abduction charge by breaching an agreement with the defendant's attorneys that police would not question the defendant while they transported him across the state. See 430 U.S. at 404-405; *id.* at 413-414 n.2 (Powell, J., concurring) ("Here, we have a * * * case * * * in which the police deliberately took advantage of an inherently coercive setting in the absence of counsel, contrary to their express agreement."); *id.* at 415 (Stevens, J., concurring) ("If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.").

the Sixth Amendment right to counsel is "offense specific." 501 U.S. at 175. *McNeil*, of course, did involve factually unrelated offenses. The accused in that case had invoked his Sixth Amendment right to counsel on a pending armed robbery charge, while the police questioned him about uncharged murder and burglary offenses that had occurred in a town different from where armed robbery had occurred. *Id.* at 173-174. Nothing in the Court's opinion in *McNeil*, however, suggests that the Court's holding turned on the fact that the uncharged and charged offenses were factually unrelated, or even that the Court deemed it relevant that the two offenses were unrelated. Rather, the Court relied solely on the fact that the accused had "provided the statements at issue * * * before his Sixth Amendment right to counsel with respect to the [uncharged] offenses had been (or even could have been) invoked." *Id.* at 176 (emphasis omitted).

Similarly, both *Brewer* and *Moulton* were decided before *Dixon*, *supra*, which adopted *Blockburger*'s "same elements" test to determine whether a defendant is being subjected to successive punishment or prosecutions for the same criminal offense, in violation of the Fifth Amendment's Double Jeopardy Clause. 509 U.S. at 703-704; cf. *Garrett* v. *United States*, *supra*. In reaching that conclusion, the Court in *Dixon*, 509 U.S. at 709, overruled its decision in *Grady* v. *Corbin*, 495 U.S. 508 (1990), which had held that, in addition to the same-elements test, a subsequent prosecution must satisfy a "same-conduct" test that barred the State from bringing "a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government w[ould] prove conduct that constitute[d] an offense for which the defendant ha[d] already been prosecuted." *Id.* at 510. The Court in *Dixon* concluded that it was "compellingly clear" that *Grady* "was a mistake," reasoning that the same-conduct test "proved unstable in application"

and was "a continuing source of confusion." 509 U.S. at 709-711. Now that the Court has adopted the same-elements test in interpreting the word "offense" under the Fifth Amendment, it would be highly anomalous for the Court to conclude that the Sixth Amendment's offense-specific rule is to be applied not only by examining the elements of the charged and uncharged offenses, but also by asking whether the offenses are "very closely related factually." Pet. App. A6.

E. An Exception For Factually Related Offenses Would Be Unworkable And Would Impose Unjustified Costs

1. This Court's adverse experience with the "same conduct" test of *Grady* v. *Corbin* strongly counsels in favor of adopting the same-elements test as the exclusive test to determine whether the Sixth Amendment permits police to question a suspect about uncharged offenses. Indeed, in two other instances, this Court has recognized the practical difficulties created by rules—other than an elements test—for determining the requisite degree of relationship between two offenses. In *Schmuck* v. *United States*, 489 U.S. 705, 709 (1989), the Court rejected an "inherent relationship" test that would have required an offense to be submitted to jury as lesser-included offense when "two offenses relate[d] to the protection of the same interests and the proof of the greater offense [could] generally be expected to require proof of the lesser offense." The Court explained that the "inherent relationship" test is "rife with the potential for confusion," while the elements test "promotes judicial economy by providing a clearer rule of decision." *Id.* at 720-721. Similarly, in *Hopkins* v. *Reeves*, 524 U.S. 88, 97 (1998), the Court held that the Constitution does not require state trial courts to instruct juries in capital cases on a "'lesser related offense'—when no lesser included offense exists." Such an instruction, the Court reasoned, would be "unworkable,"

because "there would be no basis for determining the offenses for which instructions are warranted." *Ibid.*

Like the tests rejected in *Grady*, *Schmuck*, and *Reeves*, the test applied by the decision below—whether an uncharged offense is "factually interwoven with" or "very closely related factually to the offense charged" (Pet. App. A6, A7)—is too imprecise and indeterminate to support a workable rule to govern police interrogations. The courts that have embraced an exception to the Sixth Amendment's offense-specific rule have looked to a wide variety of factors, none of which is necessarily controlling in a given case. As the Ninth Circuit has explained:

> Deciding whether the exception is applicable requires an examination and comparison of all the facts and circumstances relating to the conduct involved, including the identity of the persons involved (including the victim, if any), and the timing, motive, and location of the crimes. No single factor is ordinarily dispositive; nor need all of the factors favor application of the exception in order for the offenses to be deemed inextricably intertwined or closely related.

Covarrubias, 179 F.3d at 1225.

Because of the sheer number of factors that bear on whether an uncharged offense "is very closely related factually to the offense charged" (Pet. App. A6), it is difficult for courts to fashion a coherent body of law that achieves similar outcomes on comparable facts. Compare *Arnold*, 106 F.3d at 42 (witness intimidation charge based on defendant's threat to a witness and attempted murder charge based on defendant's subsequent hiring of a hit man to kill the witness were "sufficiently related for purposes of the Sixth Amendment exception" because the defendant's "central purpose and the intended results of both offenses were the same"), with *United States* v. *Cooper*, 949 F.2d 737, 744 (5th Cir.

1991) (rejecting claim that state offense of aggravated robbery was inextricably intertwined with federal offense of possession of an unregistered weapon, because two crimes "concern different conduct, although efficiently for the governments, both prosecutions could use much of the same evidence"), cert. denied, 504 U.S. 975 (1992).

Furthermore, because law enforcement officials must determine in advance whether they may question an accused about uncharged offenses, a Sixth Amendment exception for "very closely related" crimes (Pet. App. A6) poses even more difficulties in application than the same-conduct test that this Court in *Dixon* rejected under the Fifth Amendment. In many instances, officers will not know, before approaching a suspect to ask about an unindicted crime, all of the factual circumstances that could render that crime "closely related" to or "inextricably intertwined" with the charged crime. As a result, the question whether a court later will conclude that the right to counsel on the earlier crime extended to uncharged crimes will be unpredictable. The approach embraced by the decision below therefore would have the adverse practical effect of discouraging law enforcement officers from approaching a suspect about criminal activity and thereby would "unnecessarily frustrate the public's interest in the investigation of criminal activities." *McNeil*, 501 U.S. at 176 (quoting *Maine* v. *Moulton*, 474 U.S. at 180); see also *Massiah*, 377 U.S. at 207. At a minimum, the exception to the offense-specific rule obscures the "clear, 'bright line'" that *Michigan* v. *Jackson* intended to create so that police may conform their conduct accordingly. 475 U.S. at 634.

2. The intrusion on police investigatory work is not justified by any countervailing considerations. "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies * * * should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449

U.S. 361, 364 (1981); see also *Michigan* v. *Harvey*, 494 U.S. at 346 (declining to bar the State from using a statement taken in violation of *Michigan* v. *Jackson* to impeach a defendant's false or inconsistent testimony). In this case, extending the rule of *Michigan* v. *Jackson* to factually related uncharged offenses would impose serious costs without providing a sufficient benefit.

The Court repeatedly has observed that the exclusion of a voluntary confession deprives the trier of fact of "what concededly is relevant evidence." *Colorado* v. *Connelly*, 479 U.S. 157, 166 (1986) (quoting *United States* v. *Janis*, 428 U.S. 433, 449 (1976)); see also *United States* v. *Havens*, 446 U.S. 620, 627 (1980); *United States* v. *Calandra*, 414 U.S. 338 (1974). The Court likewise has made clear that "the ready ability to obtain uncoerced confessions," far from being an evil, is an "unmitigated good." *McNeil* v. *Wisconsin*, 501 U.S. at 181. Thus, as the Court in *Moran* v. *Burbine* observed: "Admissions of guilt are more than merely 'desirable' * * * they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." 475 U.S. at 426 (quoting *United States* v. *Washington*, 431 U.S. 181, 186 (1977)); see also *Oregon* v. *Elstad*, 470 U.S. 298, 305 (1985); *id.* at 312 (the loss of "highly probative evidence of a voluntary confession" is a "high cost to legitimate law enforcement activity"); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973) (noting the "acknowledged need for police questioning as a tool for the effective enforcement of criminal laws"). Confessions, if obtained by fair methods that guarantee their reliability, result in the resolution of many cases that could not otherwise be solved, ensure confidence in the accuracy of criminal judgments, reduce the risk of prosecuting or convicting innocent persons, and alleviate burdens on all segments of the criminal justice system. *Ibid.* Extension of *Michigan* v. *Jackson* to uncharged offenses, with the effect of excluding voluntary, re-

liable confessions from evidence, therefore would require a substantial justification.

No such justification is present here. Courts have purported to justify the application of *Michigan* v. *Jackson* to factually related offenses because "to hold otherwise would allow the government to circumvent the Sixth Amendment right to counsel merely by charging a defendant with additional related crimes after questioning him without counsel present." *Arnold*, 106 F.3d at 41 (internal brackets and quotation marks omitted); see also *Melgar*, 139 F.3d at 1013; *Doherty*, 126 F.3d at 776; Pet. App. A7.[9] That reasoning, however, presupposes that a suspect has a Sixth Amendment right to counsel with respect to offenses for which he has not been formally charged. That conclusion is incorrect. See pp. 10-12, 16-19, *supra*. In any event, there is no indication in this case that the State attempted to circumvent respondent's right to counsel on the burglary offense when police questioned him about the murder offenses on November 12, 1995, and later charged him with the murder that he confessed to committing.[10] Respondent at that time

[9] The state court also asserted that the exception "prevents the government from circumventing the Sixth Amendment right to counsel merely * * * by charging predicate crimes with the purpose of questioning a suspect on an aggravated crime." Pet. App. A7 (internal quotation marks and citation omitted). Under *Blockburger*'s same-elements test, however, an aggravated offense would be the same offense as the predicate crime and the State thus would be precluded under *Michigan* v. *Jackson* from approaching the suspect about either offense.

[10] Nor is there any reason to believe that the police believed that they had enough evidence to charge respondent with the offense of capital murder when he was indicted for burglary. Pet. App. B3-B4, B7. More generally, applying the rule of *Michigan* v. *Jackson* to closely related uncharged offenses cannot be justified in order to prevent police from deliberately filing only a subset of the provable charges in the hopes of circumventing an indicted defendant's right to counsel. For purposes of bail and plea bargaining, officials typically have an incentive to bring the most serious charges that would support an indictment against an accused.

had already confessed to the burglary, Pet. App. A4, and the State was not continuing its investigation of the charged burglary offense under the guise of investigating uncharged crimes. Nor did the State use any of the incriminating statements that respondent made on November 12, 1995, to prosecute respondent for the offense of burglary. Cf. note 2, *supra*. There is therefore no basis for applying *Michigan* v. *Jackson*'s prophylactic rule to exclude respondent's voluntary confession to the capital murder offense.

CONCLUSION

The decision of the Court of Criminal Appeals of Texas should be reversed.

Respectfully submitted.

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